(1) Supreme Court, U.S.
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No. 01-

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL TELEPHONE COOPERATIVE ASSOCIATION,
PETITIONER,

v.

EXXON MOBIL CORPORATION, RESPONDENT.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's ruling in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) — holding that a federal court of appeals must "must draw all reasonable inferences in favor of" the verdict winner, must "not make credibility determinations or weigh the evidence," and "must disregard all evidence favorable to [the verdict loser] that the jury is not required to believe" — applies on review of a jury verdict in a diversity jurisdiction case decided under state law.

2. Whether the *Erie* doctrine requires a federal court reviewing a common law jury verdict in a diversity case to evaluate the sufficiency of expert testimony under the applicable state standard to insure that the outcome is not affected by the difference in forum between federal and state court?

3. Assuming *Reeves v. Sanderson Plumbing, supra,* applies on review of a common law jury verdict in a diversity jurisdiction case, whether the court of appeals erred when it granted no deference to the trial court's view and understanding of plaintiff's theory of the case and the testimony of the witnesses and, instead, resolved alleged ambiguities in the expert witness testimony in favor of the verdict loser, all without any reference or citation to the proper standard of review, and in doing so ignored three controlling District of Columbia Court of Appeals precedents.

4. Whether the court of appeals failed to give sufficient deference to the trial judge's first-hand feel for the

witnesses, testimony and issues, as required by *Neely v. Martin L. Eby Constr. Co.*, 386 U.S. 317 (1967), and *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), when it disregarded the district court's determinations of the theory of the case and the meaning of any potential ambiguities in the expert witness testimony and, without any discussion whatsoever, denied Petitioner's motion for a new trial (made as part of its Petition for Rehearing) while granting judgment as a matter of law for the verdict loser.

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20 D.C.M.R. § 6208.1 . . . . . 1, 2

CITATIONS OF REPORTS

The opinion of the court of appeals is reported at 244 F.3d 153 (D.C. Cir. 2001), and reprinted at App. 1-9.

The district court's opinion denying Exxon's post-trial motions is unreported. It is reprinted at App. 10-16.

JURISDICTION IN THIS COURT

The court of appeals issued its decision on April 3, 2001. Petitioner timely filed a Petition for Rehearing, Petition For Rehearing *en banc,* and Motion for a New Trial on May 3, 2001. Rehearing was denied on June 14, 2001. App. 18.

This Court has jurisdiction. *See* 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

This is a common law case. The only pertinent regulations are 40 C.F.R. § 280.66 and 20 D.C.M.R. § 6208.1 (promulgated Nov. 12, 1993). They are found at App. 36-38.

STATEMENT OF THE CASE

A. The Facts

Petitioner NTCA and Respondent Exxon were neighbors on Pennsylvania Avenue, N.W., in Washington, D.C. NTCA owned and occupied a mid-sized office

building; Exxon owned a gasoline station next door.

In 1990, gasoline began leaking into the basement of NTCA's building. It is undisputed that the NTCA property was hydrogeologically "down-gradient" of the Exxon gasoline station; the trial testimony of Exxon's consulting engineer was that "the gas station was the giver and NTCA was the receiver." When Exxon stopped the leaking into NTCA's basement, NTCA believed the problem was gone.

Aware , however, that it had a problem on its site, Exxon commenced an environmental remediation program. Exxon did not consult or involve NTCA. Exxon retained Handex of Maryland, Inc. ("Handex"), an environmental engineering firm, to design and carry out the remediation program. Handex designed a remediation plan which was formalized in a legally-required document called a Corrective Action Plan ("CAP") that was submitted to and approved by the D. C. Government.[1/]

The two goals of Handex's plan were to protect the NTCA building from the possible migration of gasoline contamination and to clean up the gasoline under the Exxon property. Those goals would be achieved by installation of a groundwater "pump and treat" system — a series of wells

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1/ The CAP was required pursuant to 40 C.F.R. § 280.66, which was directly implemented by the District of Columbia Government Department of Consumer and Regulatory Affairs prior to November, 1993. Subsequent to November, 1993, and through the time of trial in May, 1999, substantively similar provisions were in effect under D.C. law. *See* 20 D.C.M.R. § 6208.1 (promulgated Nov. 12, 1993). App. 36-38.

with pumps in them. The well pumping system would "*ensure that hydrogeologic control is established* at the site to prevent further off-site migration...." CAP, App. 22 (emphasis added).

There was overwhelming evidence that Exxon did not obtain hydraulic control. NTCA's environmental remediation expert, Mr. Kent Campbell, testified that Exxon failed to achieve hydrogeologic control and that contaminated groundwater continued to flow off the Exxon site and onto the NTCA site. App. 25-27, 29-31. Even Exxon's hydrogeology expert witness, Thomas Maguire, conceded that Exxon lacked complete hydraulic control of the Exxon property. App. 32-34. Because of Exxon's failure to obtain hydrogeologic control, in March, 1995, gasoline again started leaking into the NTCA basement.

Exxon's remediation failure could not have come at a worse time for NTCA. In late 1994 NTCA decided to sell its building and move to Arlington, Virginia. Unfortunately, the month that Exxon's gasoline again started leaking into the NTCA building was *the same month* that the Embassy of Saudi Arabia visited the building as a potential purchaser. Because of the Exxon contamination, the Saudis decided not to purchase the property. Subsequently, in 1997, the Embassy of Portugal actually signed a contract to purchase the NTCA building. Again, based on the Exxon contamination, Portugal did not purchase the building. Eventually, NTCA sold the building to the Salvation Army for use as its headquarters. By then, the delay in sale caused by Exxon's failed remediation had resulted in economic damages to NTCA.

NTCA sued Exxon in the United States District Court for the District of Columbia, alleging that Exxon's remediation efforts had been negligent under District of Columbia law and that the negligent remediation had damaged NTCA. After a month-long jury trial, the Hon. Colleen Kollar-Kotelly presiding, the jury agreed and awarded NTCA approximately $2,489,000.

B. The Post-Trial Proceedings

Exxon filed a motion for judgment as a matter of law (or for a new trial); one of Exxon's arguments was that NTCA's expert witness, Mr. Campbell, had not offered sufficient testimony to establish the standard of care for environmental remediation.[2/] The district court rejected all Exxon's arguments and denied the motions in a written opinion. App. 10. The district court found that "there is *ample evidence of the standard of the industry* for the jury to measure the actions or inactions of Exxon in executing their remediation efforts...." App. 13 (emphasis added).

> [T]he theory advanced at trial by NTCA, through its expert, was that the corrective action plan ("CAP") that Handex developed on behalf of Exxon reflected the standard approach of the industry to gaining hydraulic

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[2/] In the District of Columbia, expert testimony is required to establish the standard of care where it concerns a subject so related to some profession or occupation as to be beyond the realm of knowledge of an average lay person. *E.g., Young v. District of Columbia,* 752 A.2d 138, 145 (D.C. 2000).

> control on the Exxon property to prevent continued contamination of the NTCA property. [Plaintiff's expert] *Mr. Campbell testified that, conceptually, the CAP embodied the regulatory and industry requirements* of an appropriate methodology for gaining hydraulic control on the property.... NTCA contended that Exxon had not *executed* the remedial efforts in compliance with the standards of the industry, and not that their CAP or proposal to remediate the property did not meet the standards of the industry.

App. 12-13 (emphasis added).

Exxon appealed, again raising numerous arguments. The U.S. Court of Appeals for the District of Columbia Circuit reversed. The court explicitly found that the jury had been properly instructed. App. 5-6. Thus, only a question of the sufficiency of the evidence was before the court of appeals. And yet, despite finding that "Exxon's loss of hydrogeologic control caused the renewed leakage into the NTCA's adjoining property," App. 6, the appeals court reversed the jury verdict.

In what can only be described as a surprising opinion — given that it was reversing the verdict of a properly instructed jury after a month-long trial, followed by a written trial court opinion denying Exxon's post-trial motions — the court of appeals never mentioned the standard of review *and* never addressed the trial court's findings in its brief eight-page opinion. Applying a *de novo* standard of review, the

court of appeals claimed that there was "*no* evidence," App. 8 (emphasis added), to support NTCA's theory of the case that attaining hydrogeologic control was the standard of care required of Exxon. Directly substituting its view of the *testimony* for the trial court's, the appellate court held that NTCA's expert "described the standard of care with respect only to an ultimate goal that the defendant failed to meet, not with respect to any 'practices in fact generally followed' or 'to some standard [that is] nationally recognized' from which the defendant departed." App. 2 (citing *District of Columbia v. Arnold & Porter,* 756 A.2d 427, 433 (D.C. 2000)). To the contrary, however, as quoted above, the trial court had explicitly found that the *evidence* was that "Mr. Campbell *testified* that ... the CAP *embodied the regulatory and industry requirements* of an appropriate methodology...." App. 12 (emphasis added).

REASONS FOR ALLOWANCE OF THE WRIT

1. The court of appeals' decision completely ignored this Court's recent decision on the role of a court of appeals when reviewing a trial court's denial of a motion for judgment notwithstanding the verdict. Nothing in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), indicates that it does not apply in diversity cases, but the court of appeals here never cited *Reeves* (or any other standard of review) before deciding that the evidence was insufficient.

2. The court of appeals also created an *Erie* problem when it applied a standard of review different than would have been applied in the D. C. court system. There is a

"sharp split in the circuits on the issue" of whether *Erie* requires federal courts to apply the same standard that state courts would apply regarding motions for judgment as a matter of law before vacating jury verdicts. *Cotton v. Buckeye Gas Products Co.*, 840 F.2d 935, 937 (D.C. Cir. 1988).[3/] In the local D.C. court system, where "there may have been ambiguities in [the expert's standard of care] testimony, it is [the appellate court's] obligation to resolve them in the [plaintiffs'] favor." *Levy v. Schnabel Foundation Co.*, 584 A.2d 1251, 1256 (1991). Contrary to this standard of review, the court here engaged in *de novo* review and directly substituted its view of *the evidence* and of NTCA's theory of the case for the trial court's.

The court paid no heed to the district court's superior knowledge of and feel for the witnesses, the testimony and the issues. The appellate court also departed from local law, which it misapplied. The court's decision on the sufficiency of the evidence conflicts with no less than three controlling District of Columbia Court of Appeals precedents on proof of the standard of care, two of which the court of appeals never discussed. *District of Columbia v. Watkins*, 684 A.2d 395 (D.C. 1996); *Levy, supra*; *District of Columbia v. Mitchell*, 533 A.2d 629 (D.C. 1987).

[3/] *Compare Europlast Ltd. v. Oak Switch Systems, Inc.*, 10 F.3d 1266, 1270 (7th Cir. 1993) (state *n.o.v.* standards apply); *Preferred RX, Inc. v. American Prescription Plan, Inc.*, 46 F.3d 535, 543 (6th Cir. 1995) (same); *Stephens, Inc. v. Geldermann, Inc*, 962 F.2d 808 (8th Cir. 1992) (same); *with First Bank of Denton v. Maryland Cas. Co.*, 918 F.2d 38, 42 (5th Cir. 1990) (federal law standard applies in diversity cases).

3. Last, the court of appeals, with no discussion whatsoever, denied the verdict winner's motion (on rehearing) for a new trial and instead entered judgment for Exxon, without seeking the trial court's views, even though the alleged evidentiary insufficiencies were correctable with mere linguistic and syntactical changes.

I. THE STANDARD IN *REEVES v. SANDERSON PLUMBING* APPLIES TO DIVERSITY CASES

The appellate court applied a *de novo* standard of review. That was error. As articulated recently by this Court in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000), the court of appeals was required to "draw all reasonable inferences in favor of" the NTCA. The court of appeals was forbidden to "make credibility determinations or weigh the evidence." *Id.* Further, the court of appeals was required to "disregard all evidence favorable to [Exxon] that the jury is not required to believe" — *i.e.*, evidence that is contradicted, impeached, or that comes from an Exxon witness. *Id.* at 151.

The standard for entering judgment as a matter of law contrary to a jury's verdict constitutes a "formidable hurdle," *Roboserve, Inc. v. Kato Kagaku Co., Ltd.*, 78 F.3d 266, 273 (7th Cir. 1996), and can be satisfied "only in 'extreme' cases." *Jeffries v. Potomac Development Corp.*, 822 F.2d 87, 91 (D.C. Cir. 1987). "'[T]he appellate court must consider the evidence in its strongest light in favor of the party against whom the motion ... was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify.'" *Continental Ore Co. v. Union*

Carbide & Carbon Corp., 370 U.S. 690, 690, 696 n.6 (1962) (quoting 5 Moore's Federal Practice 2316 (2d ed. 1951)). "The jury's verdict will stand unless 'the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict.'" *Smith v. Washington Sheraton Corp.*, 135 F.3d 779, 782 (D.C. Cir. 1998) (citations omitted). "'[T]he weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions....'" *Reeves, supra* (citation omitted).

The court of appeals erred in not applying the *Reeves* standard in this case. While *Reeves* was decided in the context of a federal question Age Discrimination in Employment Act[4/] case, the *Reeves* standard should also apply to federal appellate review of a state law case brought under the federal courts' diversity jurisdiction.

> As this Court noted in *Reeves*, 530 U.S. at 150: the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). It therefore follows that, in entertaining a motion for judgment as a matter of law ... the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the

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[4/] 29 U.S.C. §§ 621 *et seq.*

> evidence. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty Lobby, supra,* at 255.

The Court's reliance on *Liberty Lobby* and *Celotex* in *Reeves* is telling, as both of those cases were diversity cases decided under state law. *See Liberty Lobby*, 477 U.S. at 245 ("diversity libel action"); *Celotex,* 477 U.S. at 319 (claims of "negligence, breach of warranty and strict liability"). *See also Gunning v. Cooley,* 281 U.S. 90, 93-94 (1930) (same standard applies to question of whether a *directed verdict* should be granted in negligence case arising in District of Columbia local court system and being reviewed in the D.C. Circuit); *Tennant v. Peoria & Pekin U. R. Co.*, 321 U.S. 29, 35 (1944) (applying this standard to motion judgment *n.o.v.* in federal law negligence action under Federal Employers' Liability Act).

Reeves, then, is not limited to review of federal question cases. And yet the court of appeals here applied a *de novo* standard instead of the *Reeves* standard and in doing so erred.

II. THE FEDERAL COURT OF APPEALS REACHED A RESULT CONTRARY TO DISTRICT OF COLUMBIA LAW

The court of appeals appears to have reviewed the testimony *de novo* as if the standard of care were a question of law, but in the District of Columbia the standard of care is

a question of fact for the jury to decide. The court of appeals' decision is at variance with the result that would have been reached in the D.C. courts.

A. The Court of Appeals' *de novo* Review Raises *Erie* Questions

The D.C. courts apply a deferential standard of review in evaluating potential ambiguity in a plaintiff's standard of care testimony. This is because the standard of care is a fact question under D.C. law.

Under D.C. law, a plaintiff's verdict may be set aside on post-trial motions only "when no reasonable juror could have determined [the] appropriate standard from [the] expert testimony." *District of Columbia v. Peters,* 527 A.2d 1269, 1273 (D.C. 1987). And in the local courts of the District of Columbia, on review of a jury verdict "[i]nsofar as there may have been ambiguities in [the expert's standard of care] testimony, it is [the appellate court's] obligation to resolve them in the [plaintiffs'] favor." *Levy v. Schnabel Foundation Co.,* 584 A.2d at 1256. Thus, in the District of Columbia when the standard of care testimony is "ambiguous," the jury's verdict must be affirmed.

To the extent that the court of appeals applied a different standard of review than would be applied in the D.C. Court of Appeals, the court's decision is inconsistent with the *Erie* doctrine. *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). Under D.C. law, as expressed in *Levy,* an appellate court in this case was obligated to resolve any potential ambiguity in the standard of care testimony — for example,

whether Mr. Campbell's statement that it is "common in our industry" to use technology to "get[] hydrogeologic control," App. 25-17, and that it was "appropriate" to do so here, was equivalent to the statement required under *Arnold & Porter, supra,* that hydrogeologic control was a "practice[] in fact generally followed" by similarly situated parties — in Petitioner's favor because it was a question of fact.

And to the extent that the court of appeals has "re-examined" the jury's verdict, it violated the Re-examination Clause of the Seventh Amendment. In *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 434-35 (1996), this Court held that the federal courts of appeals, reviewing district court determinations of post-trial motions involving the evidence, are constrained to apply only an "abuse of discretion" standard. Anything more would trench on the jury's role and violate the Seventh Amendment's command that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const., amend. VII. *Id.* The court of appeals in this case applied no such standard and freely reviewed the underlying evidence to see whether, *in its view*, it could be "deemed" a standard of care.

B. The Court of Appeals Substituted Its View Of The Evidence For That Of The Trial Court

In addition to violating the *Reeves* and *Levy* standards, the court of appeals' approach to this case was insufficiently respectful to the trial judge's first-hand knowledge of the case. Just last year this Court observed that its precedents

"teach[] [that] courts of appeals should 'be constantly alert' to 'the trial judge's first-hand knowledge of witnesses, testimony, and issues'" and that "appellate courts should give due consideration to the first-instance decision-maker's '"feel" for the overall case.'" *Weisgram v. Marley Co.*, 528 U.S. 440, 443 (2000), *quoting Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 325 (1967). This is because "[t]rial judges have the 'unique opportunity to consider the evidence in the living courtroom context,' while appellate judges see only the 'cold paper record.'" *Gasperini, supra,* 518 U.S. at 438 (citations omitted).

A central error in the appeals court's approach to this case was its mis-understanding of NTCA's theory of the case and of the environmental remediation concept of "hydrogeologic control." Essentially, the court confused the *means* of the remediation (obtaining hydrogeologic control) with the *end* (protecting the NTCA property). Put differently, the court's opinion conflates the standard of care (obtaining hydrogeologic control) with the legal duty (protection of the NTCA property from Exxon's contaminants).

In perhaps the key sentence in the court of appeals' opinion, the court concluded that NTCA "introduced *no* evidence that 'ensuring hydrogeologic control' was not merely a goal but was in fact the prevailing practice." App. 7 (emphasis added). In making this statement, however, the court of appeals over-looked the evidence, re-interpreted the evidence, and even adopted *Exxon's view* of the evidence, and thus did not comply with the governing standard of review found in *Reeves*.

The trial judge, for one — who, after all, presided over the month-long trial — had a different view. The trial judge found that "there is *ample evidence* of the standard of the industry for the jury to measure the actions or inactions of Exxon in executing their remediation efforts...." App. 13 (emphasis added).

> [T]he theory advanced at trial by NTCA, through its expert, was that the corrective action plan ("CAP") that Handex developed on behalf of Exxon *reflected the standard approach of the industry* to gaining hydraulic control on the Exxon property to prevent continued contamination of the NTCA property. Mr. Campbell testified that, conceptually, the CAP *embodied the regulatory and industry requirements* of an appropriate methodology for gaining hydraulic control on the property.... Instead of using the term "standard," much of the testimony included terms such as "appropriate," but it was still *clear* that *these references denoted what was acceptable within the industry* regarding specific remediation efforts. *Mr. Campbell's testimony included references to methodologies standard to the industry*....

Id. at 20-21 (emphasis added).

Four times in its brief opinion the court of appeals incorrectly referred to "hydrogeologic control" as a "goal" or

an "objective" or as a "result" to be achieved.[5/] The testimony, however, was that obtaining hydrogeologic control was a *practice* "fairly common in our industry." App. 25.

By deeming hydrogeologic control a mere "goal," the court of appeals led itself into a direct violation of the governing standard of review. Having labeled hydrogeologic control a "goal," the court of appeals concluded that "*[w]e* cannot deem" hydrogeologic control to be a standard of care because it is (allegedly) merely a "goal" that is "unrelated to any accepted practice." App. 2, 7 (emphasis added). But it was not the appellate court's role to "deem" something a standard of care — that is a job for the expert witness and the jury. As recently stated by the D.C. Court of Appeals, "'the proper inquiry is *not what the court deems* [the standard of care to be], but what experts in the relevant discipline reasonably deem it to be.'" *Arnold & Porter, supra,* 756 A.2d at 434-35 (*quoting In re Melton,* 597 A.2d 892, 903 (D.C. 1991) (en banc)) (brackets in original, emphasis added); *see also District of Columbia v. Wilson,* 721 A.2d 591, 599-600 (D.C. 1998) (same).

Contrary to the court of appeals's opinion, hydrogeologic control was not the "goal" of the CAP. It was,

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[5/] *See* App. 2 ("expert described the standard of care with respect only to an ultimate *goal*") (emphasis added); *id.* at App. 3 (hydrogeologic control was the desired *"result"* of the CAP) (emphasis added); *id.* at App. 6 ("NTCA's principal theory is that the *objective* of the CAP — to 'ensure that hydrogeologic control is established —itself supplies the relevant standard of care") (emphasis added); App. 7 ("[w]e cannot deem the CAP's stated *goal* of 'ensur[ing] hydrogeologic control' a standard of care") (emphasis added).

instead, the *means* or *practice* to be employed to reach two different goals — the protection of the NTCA property from harm and the cleanup of the Exxon property. The CAP itself, in language the court of appeals quoted but apparently misunderstood, states that hydrogeologic control is being sought in order "to *prevent* further off-site migration," CAP, App. 22 (emphasis added), a clear statement that prevention of migration was, in fact, the actual "goal." NTCA's expert, Mr. Campbell identified hydrogeologic control as a *means* to that end when he stated "if you obtain hydrogeologic control ... you prevent your contamination from becoming somebody else's contamination." App. 26. The other witnesses' testimony was similar.[6/] The trial court, too, understood that hydrogeologic control was a *means* not an end. *See* App. 12 (the CAP "that Handex developed on behalf of Exxon *reflected the standard approach* of the industry to gaining hydraulic control on the Exxon property to *prevent* continued contamination of the NTCA property").[7/]

[6/] The Exxon consulting engineer who wrote the CAP, identified the *goal* of the CAP when he testified that protection of the NTCA property was a "top priority" because "we had a building that we were worried about." *See* App. 24. Similarly, the head of the DCRA Tank Division, Dr. Sreenivas, identified the *goal* when he testified that the governing regulations require a polluting party, like Exxon, to "prevent further migration" of released material into surrounding properties. App. 32.

[7/] Another way to demonstrate the error of the appeals court's conclusion that hydrogeologic control was merely a "goal" and not a "practice" is to note that Exxon evaluated twelve other ways to conduct this remediation. Exxon's consulting engineer testified that there were many different technologies available for consideration in choosing a

(continued...)

C. The CAP' s Choice of Hydrogeologic Control Met and Constituted the Standard of Care

The court of appeals missed this point and the import of the testimony because it focused, instead, on the minutiae of *how* hydrogeologic control would be obtained, *e.g.*, the number and placement of wells and vacuums used to obtain hydrogeologic control, and in doing so even adopted *Exxon's view* of the evidence.[8/] But the court of appeals' approach is like saying that an expert witness in a medical malpractice

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[7/] (...continued)
remediation system and that there were 13 different ways that might potentially be applicable to cleaning up this kind of a problem. App. 23. Several of those methods did not involve gaining hydrogeologic control at all. Mr. Campbell's testimony was that Exxon's choice of the hydraulic control *method* in the CAP from among the other methods met the standard of care and was consistent with the practices in the industry.

[8/] And at this level of evidentiary detail, as can be expected with material so detailed and complex presented in the summary format of appellate briefs and arguments, the appeals court mis-understood or re-interpreted the testimony in crucial ways. For example, the court of appeals writes that "[Mr.] Campbell[] identified no practice or provision in the CAP from which Exxon departed." App. 7. The court of appeals found as *fact* that the number of wells drilled "fully complied with the CAP." *Id.* at 8. The court here was (improperly) adopting *Exxon's view of the evidence*, which was that the CAP only called for two wells on the Exxon/NTCA property line. But Mr. Campbell's testimony was that *a different part* of the CAP calculated that each well had a "radius of influence" of only 12 feet or a "capture zone" of only 24 feet, and that two wells therefore could not gain hydrogeologic control of a 110 foot property line. *See* App. 29-31.

case cannot testify that the standard of care was that the defendant doctor "should have attempted to provide [the patient] with something to reduce his pain" — testimony that the D.C. courts have *accepted* as valid standard of care testimony, *District of Columbia v. Watkins*, 684 A.2d 395, 402 (1996) — and instead must testify that the defendant was required to use Motrin instead of Tylenol. The law simply does not require that level of detail.

The court of appeals' statement that there was "no evidence" that hydrogeologic control "was not merely a goal but was in fact the prevailing practice," App. 7, is simply wrong. The testimony here explicitly satisfied the requirement identified by the court of appeals that the expert testimony "be related ... to 'practices in fact generally followed'" by similarly situated parties. App. 6, *quoting Arnold & Porter*, 756 A.2d at 433. Mr. Campbell explicitly stated that the it is "common in our industry" to use technology to "get[] hydrogeologic control." App. 25-27.[9/] As the trial court put it, "[w]hen the extensive testimony of Mr. Campbell, as well as all of the other evidence, is considered *in toto*, there is ample evidence of the standard of the industry for the jury to measure the actions or inactions of Exxon...." App. 13.

9/ All of the other witnesses agreed that obtaining hydrogeologic control was the appropriate standard of care. The Exxon consulting engineer who wrote the CAP, "wanted to get hydraulic control" and "wanted to control the water." App. 23. Dr. Sreenivas, the head of D.C.'s Underground Tank Division, testified that Exxon's plan to obtain hydrogeologic control using technology was acceptable "in the scientific community." App. 31.

The court of appeals' conclusion that the testimony was not enough — indeed, the court labeled it "no evidence" — can only be affirmed using a formalistic or "magic words" approach. Instead of magic words, Mr. Campbell said it is "common in our industry" to use pump and treat technology to "control[] groundwater flow" and that "controlling groundwater flow is ... the same thing as getting hydrogeologic control." App. 25. To conclude that such testimony does not satisfy the legal minimum violates the appropriate standard of review. District of Columbia law does not "require a particular incantation" or the use of "formal terms." *District of Columbia v. Wilson,* 721 A.2d 591, 596 (D.C. 1998). An expert is not required to "identify every authority on which he relies," nor is he required to "quote[] chapter and verse." *Id.* at 599. *Accord Doe v. Dominion Bank of Wash.,* 963 F.2d 1552, 1563 (D.C. Cir. 1992) (Ginsburg, R., J.) ("particularized citation" not necessary).

D. NTCA's Evidence Met the Requirement for Proof of Standard of Care Under D.C. Law

The appeals court's brief opinion discussed only two cases on what is an acceptable standard of care under D.C. law — *Arnold & Porter, supra,* and *Levy v. Schnabel Foundation Co.,* 584 A.2d 1251 (D.C. 1991).

Levy, the court claimed, is the "lone precedent that NTCA marshals" in the hope of bridging a gap the court perceived between the CAP's choice of hydrogeologic control as the cleanup method and the *Arnold & Porter* requirement that a standard of care be a "practice in fact generally

followed" in the industry. *Levy,* however, *affirmed* a jury verdict based on testimony that the standard of care in a construction case required the defendant to "take all necessary steps to prevent any movement" of the neighboring property.

Further, *Levy* was not and is not the "lone precedent" cited by NTCA. A substantial number of District of Columbia cases have affirmed plaintiff's verdicts based on standard of care testimony similar to or weaker than the testimony in this case. In *District of Columbia v. Mitchell,* 533 A.2d 629, 649 (D.C. 1987) — a case cited by NTCA for this point but ignored by the court of appeals — the D.C. Court of Appeals found that expert testimony that the defendant doctor's treatment was "not ... aggressive enough" was sufficient to present a standard of care; the expert was *not* required to state in detail what more needed to be done. Similarly, in *District of Columbia v. Watkins*, 684 A.2d 395, 402 (D.C. 1996), another case cited by NTCA but ignored by the court of appeals, the D.C. Court of Appeals held expert testimony that the defendant should have "provided [the patient] with something to reduce his pain" was "sufficient to establish" the standard of care; the expert was *not* required to identify what pain medication was necessary.[10/] In *Doe v. Dominion Bank of Washington, N.A., supra,* the court confirmed the trial judge's ruling in a premises liability rape case that expert testimony that vacant areas of a building had to "be locked off" was satisfactory to establish the standard of care; such testimony is indistinguishable from the testimony

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[10/] The continuing validity of *Mitchell* and *Watkins* was recently reaffirmed in *District of Columbia v. Wilson, supra,* 721 A.2d at 598-99.

here that in order to protect NTCA the Exxon contamination had to be "blocked off" by use of hydrogeologic control.

III. AT THE VERY LEAST, NTCA SHOULD HAVE BEEN GRANTED A NEW TRIAL

At the very worst, the "proof" problems identified by the court of appeals appear to be technical and linguistic in nature. There is no question that Exxon polluted NTCA's property. There is no question that Exxon's remediation failed to prevent re-contamination of NTCA's property. There is no question that NTCA was seriously damaged by Exxon's conduct. NTCA, which won a substantial jury verdict after a month-long trial, should have been permitted to correct the evidentiary "problems" identified by the court of appeals.

The court of appeals had the authority, even on rehearing, to grant a new trial, or to remand the case to the district court for the trial judge to make that decision. *Weisgram v. Marley Co.*, 528 U.S. 440, 454-55 (2000) ("if judgment is instructed for the verdict loser, [the verdict winner] will have a further chance to urge a new trial in a rehearing petition"). In making that determination, this Court has "emphasiz[ed] the importance of giving the party deprived of a verdict the opportunity to invoke the discretion of the trial judge to grant a new trial." *Weisgram*, 528 U.S. at 449. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), "teaches [that] courts of appeals should 'be constantly alert' to 'the trial judge's first-hand knowledge of witnesses, testimony, and issues'" and that "appellate courts should give due consideration to the first-instance decision-maker's '"feel"

for the overall case.'" *Weisgram*, at 443, *quoting Neely*, 386 U.S. at 325. Here, of course, the trial court understood the evidence differently than the court of appeals and, indeed, perceived it to be "ample" to prove the standard of care. In the eyes of the district court (not to mention the jury) this was not even a close case.

In that light, if the court of appeals believed that Mr. Campbell was not asked the proper questions or gave his answers using improper terminology, NTCA should have been given an opportunity by the appellate court to correct those short-comings.

Respectfully submitted,

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Dated: September 12, 2001

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 16, 2001 Decided April 3, 2001

No. 99-7124

NATIONAL TELEPHONE COOPERATIVE ASSOCIATION, Appellee

v.

EXXON MOBIL CORPORATION, A New Jersey Corporation, Appellant

Appeal from the United States District Court for the District of Columbia (No. 96cv02504)

Arthur H. Jones, Jr. argued the cause for appellant. With him on the briefs were Robert T. Lehman, Cynthia J. Morris, and Heather E. Gange.

Donald B. Mitchell, Jr. argued the cause for appellee. With him on the brief was James H. Hulme.

Before: Edwards, Chief Judge, Ginsburg, and Randolph, Circuit Judges. Opinion for the Court filed by Circuit Judge Ginsburg

Ginsburg, Circuit Judge:
The plaintiff in this case won a jury verdict and judgment on the theory that the defendant negligently performed an environmental remediation; the central question before us is

whether the plaintiff at trial established the standard of care, which is necessary to support the judgment in its favor. Under the law of the District of Columbia, if the applicable standard of care in a negligence action is "beyond the ken of the average layperson," then the plaintiff must establish that standard through the testimony of an expert. *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 433 (2000) (quoting *Messina v. District of Columbia*, 663 A.2d 535, 538 (D.C. 1995)). Specifically, the expert must clearly articulate and [refer to] a standard of care by which the defendant's actions can be measured .... Thus the expert must clearly relate the standard of care to the practices in fact generally followed by [similarly situated parties] or to some standard nationally recognized by such [parties]. *Id.* (quoting *Phillips v. District of Columbia*, 714 A.2d 768, 773 (D.C. 1998)). To similar effect, "[t]he personal opinion of the testifying expert as to what he or she would do in a particular case, without reference to a standard of care, is insufficient to prove the applicable standard of care." *Travers v. District of Columbia*, 672 A.2d 566, 568 (D.C. 1996).

No one doubts that the standard of care in this case is beyond the ken of the average layperson. In mounting its case, therefore, the plaintiff introduced expert testimony; but its expert described the standard of care with respect only to an ultimate goal that the defendant failed to meet, not with respect to any "practices in fact generally followed" or "to some standard [that is] nationally recognized" from which the defendant departed. *Arnold & Porter*, 756 A.2d at 433. Under *Arnold & Porter* and the cases from which it springs, such testimony is insufficient for the plaintiff to prevail and we therefore must reverse the judgment of the district court.

I. Background

The National Telephone Cooperative Association (NTCA) sued the Exxon Mobil Corporation (Exxon) in district court, alleging negligence. At the time of the events at issue, the NTCA owned and occupied an office building in the District of Columbia that abutted a gas station owned by Exxon. In March 1990 the NTCA discovered a black liquid seeping through a crack in the basement of its office building. The NTCA reported the problem to Exxon, which sent environmental engineers to examine the site and to repair the basement wall. Exxon also conducted a comprehensive investigation of petroleum contamination on its own property and reported the problem to the D.C. Department of Consumer and Regulatory Affairs (DCRA). Exxon then submitted to the DCRA, and the DCRA approved, a Corrective Action Plan (CAP) pursuant to which Exxon would remediate petroleum contamination on its property. There were two basic components to the CAP: a "pump and treat" system that used a series of wells containing pumps to control the migration of groundwater and to remove gasoline from the water table; and a "soil vapor extraction" (SVE) system that removed vaporous gasoline from the soil. The CAP further detailed a number of specific measures that Exxon would take and the types of technology that it would use. According to the CAP, the result would be to "ensure that hydrogeologic control is established at the site to prevent further off-site migration, as well as eliminate residual soil hydrocarbons that could [contaminate the groundwater]." Notwithstanding Exxon's remediation efforts, the leakage of black liquid through the crack in the wall of the NTCA's office building recurred in March 1995. The NTCA was then poised to sell its office building but the deal fell through owing to the leak. The NTCA finally sold the building three

years later.

The NTCA proceeded to the jury on the theory that Exxon had been negligent in its remediation. The NTCA argued, and the district court agreed, that Exxon's own CAP supplied the operative standard of care. The expert who testified in support of the NTCA's theory of negligence, Mr. Kent Campbell, took issue with four aspects of Exxon's remediation: (1) the type of pump Exxon installed in the wells; (2) its failure to excavate more dirt in installing underground storage tanks; (3) its installation of an insufficient number of wells to capture groundwater; and (4) its failure to install and to run an adequate SVE system. As Exxon clarified in cross-examining him, Campbell expressly grounded these criticisms in his own views and did not relate them to any general practice or recognized standard. Although Campbell did not specify exactly how Exxon should have achieved hydrogeologic control, he did testify that it should have achieved it and that Exxon's loss of hydrogeologic control coincided with recurrence of the leakage.

The NTCA contended that the leakage, in addition to damaging its building, delayed sale of the building for three years and thus both deprived it of the return it would have realized from investing the proceeds of an earlier sale, and owing to a change in market conditions forced it to pay more for a long-term lease on the building to which it eventually moved. The jury found in favor of the NTCA, awarding it $30,000 in damages for harm to the building and $2,459,357 in damages arising from the delayed sale. The district court entered judgment on that verdict and Exxon appealed, challenging both the determination that it was negligent and the award of damages for delaying the sale of the building.

II. Analysis

Initially Exxon maintains that the doctrine of primary jurisdiction forecloses a finding of negligence; specifically, Exxon claims the DCRA's exercise of its regulatory authority in approving Exxon's remediation plan gave the DCRA primary jurisdiction, to which the district court owed deference. *See United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956) (doctrine "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body"). We review the district court's decision to the contrary only for abuse of discretion. *See Environmental Technology Council v. Sierra Club*, 98 F.3d 774, 789 (4th Cir. 1996); *Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 947-48 (10th Cir. 1995).

Exxon failed to show that the DCRA oversees a comprehensive regulatory scheme that in any way would be disturbed by the instant action. At most the record suggests that the DCRA saw nothing in Exxon's remediation plan that violated the agency's regulations -- not that the DCRA so closely supervised the remediation planning or implementation as in practice to prescribe the standard of care that would govern it. The district court was well within its discretion, therefore, in hewing to the principle that conduct complying with administrative regulations may nonetheless be negligent. *See, e.g., Restatement (Second) of Torts* § 288C.

Exxon also claims that "because the standard of care for a service station remediation is not readily discernible by a lay person, the District Court erred in not instructing the jury that the NTCA had to establish that standard through expert testimony." Exxon's sole basis for objecting to the lack of a jury instruction on this point is *District of Columbia v. Mitchell*, 533 A.2d 629, 649-50 (D.C. 1987), in which the

Court of Appeals refused to reinstate a verdict for the plaintiff in a medical malpractice case because such an instruction had not been given. *Id.* at 649-50. Even if *Mitchell* can be read as stating a per se rule -- a proposition for which it has never been cited -- Exxon must show prejudice in order to secure reversal upon the basis of a missing jury instruction. *See Material Supply Int'l, Inc. v. Sunmatch Indus. Co.*, 146 F.3d 983, 992 (D.C. Cir. 1998). In this case any error was assuredly harmless: the district court instructed the jury that the NTCA bore the burden of proof and that the relevant standard of care was that of a specialist performing remediation; Campbell's was undisputedly expert testimony, and there was no other evidence from which the jury could have concluded that the NTCA carried its burden.

Exxon next argues that the NTCA did not fulfill its obligation to explain to the jury the operative standard of care for the remediation. The NTCA's answer is that it permissibly treated Exxon's own CAP as supplying that standard. The NTCA's principal theory is that the objective of the CAP -- to "ensure that hydrogeologic control is established" -- itself supplies the relevant standard of care. If so, then liability would be established by the jury finding that Exxon's loss of hydrogeologic control caused the renewed leakage into the NTCA's adjoining property.

This theory is more akin to strict liability or to negligence per se -- both of which the district court expressly rejected -- than to simple negligence; it entails no effort to connect the damage to any particular conduct in which Exxon did or did not engage. The theory is therefore inconsistent with the District of Columbia's requirement that a standard of care beyond the grasp of a lay jury be related either to "practices in fact generally followed" or "to some standard [that is] nationally recognized." *Arnold & Porter*, 756 A.2d at 433.

We cannot deem the CAP's stated goal of "ensur[ing] hydrogeologic control" a standard of care on this record because it stands unrelated to any accepted practice or standard to which Exxon should have but failed to conform.

The lone precedent that NTCA marshals in hope of bridging this gap is *Levy v. Schnabel Found. Co.*, 584 A.2d 1251 (D.C. 1991), which involved allegedly negligent construction; the court held that "tak[ing] all necessary steps to prevent any movement that would cause damage to adjacent properties" constituted a standard of care. *Id.* at 1255. The court so held, however, only because there was expert testimony -- indeed, an expert for each party had specifically testified -- that this was "the applicable standard of care for persons engaged in [the defendant's line of work]." Id. Therefore, although this "articulation of the standard of care might be viewed as sounding more like a lofty goal," *id.* at 1256, the "expert testimony was sufficient, albeit barely so" to establish it as the applicable standard of care. *Id.* at 1255. In this case the NTCA cannot claim the benefit of Schnabel because it introduced no evidence that "ensuring hydrogeologic control" was not merely a goal but was in fact the prevailing practice or a national standard applicable to Exxon's efforts at environmental remediation.

The NTCA fares no better with its argument that the prescriptions in the CAP supply a standard of conduct to which Exxon might be held. The central problem with the argument is that the NTCA's expert, Campbell, identified no practice or provision in the CAP from which Exxon departed in any way that might have caused the harm. Indeed, Campbell consistently couched his criticisms in terms of his personal opinion, which does not suffice under the law of the District of Columbia. *See Travers*, 672 A.2d at 568 (quoted above at page 2). Consider: One of Campbell's four criti-

cisms of the remediation effort was that Exxon drilled too few wells to capture the groundwater; yet that aspect of Exxon's remediation effort fully complied with the CAP. Two of Campbell's criticisms related, respectively, to the type of pump Exxon installed in the wells and to the amount of dirt it excavated in installing storage tanks; these issues were not addressed in the CAP, however, nor did Campbell attempt to tie them thereto. Campbell's final criticism was that Exxon was late in installing the SVE system called for in the CAP, and then ran it less than half the time it was in place; although this might identify a breach of the CAP, the NTCA adduced no evidence that causally connects it to Exxon's loss of hydrogeologic control and the ensuing harm to the building.

Finally, the NTCA suggests that "the regulations cited in the trial court's 'evidence of negligence' jury charge are relevant evidence the Jury could consider in determining the common law standard of care." These regulations avail it not with respect to the standard of care, however, as the NTCA did not introduce expert testimony explaining their application, as required in the District of Columbia. *See McNeil Pharm. v. Hawkins*, 686 A.2d 567, 583 (D.C. 1996) ("this jurisdiction has required expert testimony to explain the applicability of statutes where the statute is relied upon as establishing the standard of care").

In sum, the NTCA failed to establish a standard of care consistent with its theory of negligence. As that is fatal to the NTCA's case, we do not reach Exxon's other arguments.

III. Conclusion

Because the NTCA did not introduce evidence of the standard of care through expert testimony as required under the law of the District of Columbia, it did not prove its case against Exxon. The judgment of the district court in favor of

the NTCA is therefore reversed and vacated, and this case is remanded to the district court for it to enter judgment in favor of Exxon.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL TELEPHONE COOPERATIVE ASSOCIATION,

Plaintiff,

Civil Action No. **96-02504** (CKK)

v.

FILED March 29, 2000

EXXON CORPORATION,
Defendant.

Nancy Mayer Whittington, Clerk
U.S. District Court

MEMORANDUM OPINION
(March 29, 2000)

This matter is before the Court on Defendant Exxon Corporation's ("Exxon") Renewed Motion for Judgment As A Matter of Law or, in the Alternative, for a New Trial [#176] and Exxon's Motion for Remittitur or for New Trial on Damages [Exhibit to #176], Plaintiff National Telephone Cooperative Association's ("NTCA") opposition to both of Plaintiff's motions, and Defendant's Replies to the opposition to their motions. At trial, the jury found Exxon liable on NTCA's claim of negligent environmental remediation of Exxon's property, and deterined "that the negligent remediation proximately caused the NTCA

property to become contaminated." Jury Verdict form. The jury also found that the contamination of the NTCA property proximately caused NTCA's property to diminish in value, awarding $30,000 in damages. In addition, the jury found that the contamination of the NTCA property proximately caused the sale of the NTCA property to be delayed, awarding damages in the amount of $2,459,357. The Court will address both motions in one Memorandum Opinion and Order.

Exxon asserts several grounds for granting its Motion for Judgment as a Matter of Law or alternatively for a New Trial. Exxon claims that NTCA failed to establish a standard of care or of the industry regarding NTCA's negligent environmental remediation efforts, and that the evidentiary record as a matter of law is insufficient to support a finding that the remediation was the proximate cause of the contamination of NTCA's property. Exxon objects to the jury instructions that certain statutory and regulatory provisions could be considered by the jury as evidence of negligence, arguing that because of the alleged lack of evidence of a standard of care, the jury would necessarily and improperly infer that these provisions constitute a negligence *per se* standard. Finally, Exxon argues that the doctrine of primary jurisdiction applies in this case. Alternatively, Exxon argues that the jury's verdict on liability is against the clear weight of the evidence.

Pursuant to Rule 50(b) and the case law interpreting it, the jury verdict must stand if there is legally sufficient evidence to support it. *See* Fed. R. Civ. P. 50(b). The Court cannot grant Exxon's Motion for Judgment as a Matter of Law unless the Court concludes, after reviewing all of the evidence in the light most favorable to NTCA and resolving all conflicts in its favor, *see Mackey v. United States*, 8 F.3d

826 (D.C. Cir. 1993), that "the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict." *Scott v. District of Columbia,* 101 F.3d 748, 753 (D.C. Cir. 1996). "Moreover, a post-trial motion for judgment as a matter of law may be granted only upon grounds advanced in the pre-verdict motions." *Nyman v. F.D.I.C.*, 967 F. Supp. 1562, 1568 (D.D.C. 1997). Although less onerous than that of a Rule 50(b) motion, the standard applicable for a motion for a new trial in this case under Rule 59(e) requires ultimately that it be clearly established that a manifest error of either law or fact has been made. *See id.* at 1569.

With regard to the issue of whether NTCA established a standard of care, the Court has reviewed the testimony of NTCA's expert, Kent Campbell, as well as other evidence in the case. In this lengthy trial, two experts and many technical fact witnesses testified, whose profession and experience involved remediation of contaminated sites such as this one. Extensive documentary evidence was also introduced. To summarize, the theory advanced at trial by NTCA, through its expert, was that the corrective action plan ("CAP") that Handex developed on behalf of Exxon reflected the standard approach of the industry to gaining hydraulic control on the Exxon property to prevent continued contamination of the NTCA property. Mr. Campbell testified that, conceptually, the CAP embodied the regulatory and industry requirements of an appropriate methodology for gaining hydraulic control on the property. There was no dispute that hydraulic control was the goal of the remediation efforts. Instead of using the term "standard," much of the testimony included terms such as "appropriate," but it was still clear that these references denoted what was acceptable

within the industry regarding specific remediation efforts. Mr. Campbell's testimony included references to methodologies standard to the industry, and indicated whether certain actions or inactions on the part of Exxon reflected "good" or "appropriate" professional engineering practices in executing the remedial efforts. NTCA contended that Exxon had not executed the remedial efforts in compliance with the standards of the industry, and not that their CAP or proposal to remediate the property did not meet the standards of the industry. Mr. Campbell replied in the negative when asked the question "whether Exxon's remediation was carried out in a competent and professional manner consistent with good engineering practice?" May 13, 1999 Tr. At 93, lines 12-15. When the extensive testimony of Mr. Campbell, as well as all of the other evidence, is considered *in toto*, there is ample evidence of the standard of the industry for the jury to measure the actions or inactions of Exxon in executing their remediation efforts, the gravamen of their liability claim. There was also a plethora of evidence sufficient to support the jury's finding that Exxon's actions and inactions constituted the proximate cause of the contamination of NTCA's property. Therefore, the jury verdict was not against the clear weight of the evidence in the case.

The Court has already ruled at trial on the issue of the jury instructions relating to the appropriate use by the jury of the statutory and regulatory provisions, and adopts those findings as part of this opinion. Moreover, given the Court's finding that there was sufficient evidence on the issue of the standard of the industry, the argument that these jury instructions were converted into instructions on negligence *per se* lacks all merit. In a motion *in limine*, Exxon argued pretrial that compliance with the District of Columbia

Department of Health's regulations dispositively resolved Exxon's liability on the issue of negligent remediation. The Court in its November 21, 1999 order resolved this issue against Exxon. The Court also noted in that order that there was no primary jurisdiction issue because there were no pending related proceedings before local administrative bodies. Exxon did not dispute those findings at the time, and the Court has not been provided evidence to the contrary. Exxon is either repeating an argument already made on which it did not prevail, or raising this argument for the first time, which it cannot do. The Court has discretion to defer jurisdiction to administrative agencies in certain circumstances. The practice is to defer before a trial, not subsequent to a trial as Exxon seems to be arguing. *See Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993). For the all of the foregoing reasons, the Court denies Exxon's Motions for Judgment as a Matter of Law or Alternatively for a New Trial.

Pursuant to Rule 59(e), Exxon moves for Remittitur or for a New Trial, maintaining that the delay damages are not recoverable as a matter of law, that the evidence offered in support of the delay damages is insufficient factually and as a matter of law, and that the evidence to support the calculation of delay damages was insufficient. *See* Fed. R. Civ. P. 59(e). On June 2, 1999, prior to the verdict, Exxon filed Defendant Exxon Corporation's Supplemental Motion for judgment as a Matter of Law ("Supplemental Motion"), in which it incorporated various prior motions relating to the issue of delay damages. The Court has ruled on these motions, and incorporates these rulings as part of this opinion. Exxon advanced two arguments in the Supplemental Motion: 1) that the claim for delay damages was raised after the close of discovery; and 2) that the

evidence of the calculations was unreliable. It is debatable whether the cursory and conclusory treatment accorded the delay damages in the Supplemental Motion fully encompassed the more fulsome arguments raised in the Rule 59(a) motion presently under consideration. That being said, the Court will respond to the present arguments.

In this case, the Court provided the jury with a special verdict form separating out the liability determination as to whether NTCA had proved by a preponderance of the evidence that the contamination proximately caused the delay in the sale of the NTCA property from the determination as to whether NTCA proved damages caused by that delay. Within the damages section, the form further separated out the claims for diminution of value. The Court has already found as a matter of law that NTCA could recover economic damages in this negligent remediation action which would encompass the diminution of value of the contaminated building, and derivatively, as a natural and probable consequence, delay damages resulting from any delay in the sale of the NTCA building because of its contaminated state.

The key question in this case is whether there was a sufficient factual predicate to conclude that the contaminated state of the property resulting from the Exxon's negligent remediation efforts was the proximate cause of the claimed delay, and whether the delay damages were foreseeable as a reasonable consequence of the negligent remediation. There was evidence that Exxon knew that NTCA was endeavoring to sell the building, and that it would be moving to the Virginia suburbs. Both parties presented conflicting testimony relating to the efforts and problems with finding a buyer for the property, to the possible locations and rental prices in Virginia, and to whether or not those prices had increased over the years that the sale of the NTCA property

was delayed. The jury did not accept all of the calculations presented by NTCA, but came to their own calculations in awarding a lesser amount of delay damages than NTCA had requested. It was the province of the jury to credit or not to credit the testimony of these various witnesses. In sum, the Court has found that delay damages as matter of law are cognizable in a negligence action, and finds today that, if the evidence presented by NTCA was credited, it was sufficient to establish that the delay damages were proximately caused by the negligent actions and inactions of Exxon, as well as the various calculations which the jury could have utilized in awarding its damages. The Court cannot find, based on all of the evidence presented, that the award of delay damages does not fall within a reasonable range. *See Nyman*, 967 F. Supp. at 1570-71. Accordingly, Exxon's Motion for Remittitur or for a New Trial is denied. An Order accompanies this Memorandum Opinion.

_____

COLLEEN KOLLAR-KOTELLY
United States District Judge

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1200 Nineteenth Street, N.W.
Washington, DC 20036

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL TELEPHONE
COOPERATIVE ASSOCIATION,

Plaintiff,

v. Civil Action No. 96-02504

FILED

EXXON CORPORATION, AUG - 8 2001

Defendant.

ORDER

This case comes before the Court upon an order of reverse and remand from the United States Court of Appeals for the District of Columbia Circuit. Pursuant to the instructions from the Court of Appeals, it is this 8th day of August, 2001, hereby

ORDERED that this Court's entry of judgment in favor of Plaintiff NTCA is VACATED; and it is further

ORDERED that final judgment is entered in favor of Defendant Exxon.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-7124 **SEPTEMBER TERM, 2000**
96cv02504

National Telephone Cooperative Association,
Appellee

Filed On:
June 14, 2001

v.

Exxon Mobil Corporation, A New Jersey Corporation,
Appellant

BEFORE: Edwards, Chief Judge, Ginsburg and Randolph, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing and motion for a new trial, filed May 4, 2001, it is **ORDERED** that the petition and motion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
/s/ Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-7124 **SEPTEMBER TERM, 2000**

National Telephone Cooperative Association,
Appellee

Filed April 5, 2001

v.

Exxon Mobil Corporation, A New Jersey Corporation,
Appellant

Appeal from the United States District Court
for the District of Columbia
(No. 96cv02504)

Before: EDWARDS, *Chief Judge*, GINSBURG and RANDOLPH, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the

judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded with instructions, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY:

/s/Robert A. Bonner
Deputy Clerk

Date: April 3, 2001

Opinion for the Court filed by Circuit Judge Ginsburg.

Excerpt of
CORRECTIVE ACTION PLAN
Exxon Service Station 2-1254
2600 Pennsylvania Ave, NW
Washington, DC

PREPARED BY:

Handex of Maryland, Inc.
360 Morgan Road, P.O. Box 290
Odenton Maryland 21113-0369
(301) 674-3200

January 30, 1991

Respectfully submitted,

Kip Kraus
Senior Hydrogeologist

Diana Kamenl Treetin
Projects Manager
Senior Hydrogeologist

[Trial Ex. 2]

5.2 Recommended Technology

Based on the information provided in this report, HMI recommends remediation of both the liquid and dissolved hydrocarbons in the soils and groundwater beneath the site. A combination of groundwater pumping and soil venting will ensure that hydrogeologic control is established at the site to prevent further off-site migration, as well as eliminate residual soil hydrocarbons that could act as a continuing source of dissolved hydrocarbons in the groundwater. The two systems will augment each other by (1) lowering the water table and exposing a greater portion of the subsurface to the effects of soil venting and (2) drawing water and immobile hydrocarbons from the formation by creating a pressure gradient that will increase hydrocarbon migration to the wells. The combination of the two systems would increase fluid recovery and vapor concentrations extracted from the wells, resulting in a cost-efficient and effective remediation program. Figure 18 is a schematic of a typical combined pumping and venting remediation system.

Excerpt of Kip Kraus Trial Testimony
(Vol. 2)

Page 138

Q. So, here in October you're telling them that there's 13 different ways we could do this; right?
A. That we could enhance the system, yes.
Q. And, ultimately, you told them, right here in this same letter – I've highlighted it – that only four of these 13 are viable for application at the site; right?
A. Yes.
Q. Viable means?
A. Practical.
Q. Practical. So you eliminated nine of them right off the bat; right?
A. Yes.

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Q. You wanted to get hydraulic control; correct?
A. Yes, we did.
Q. Hydraulic control. Hydro, water. You wanted to control the water; right?
A. Yes.
Q. And so you told Exxon that what you recommend is that you do two things at once; correct?
A. Yes, we did.
Q. One of those things was put pumps in a number of different wells around the site and try to create one of those cones of depression, correct –
A. Yes.
Q. – around each of those wells.

And another thing you wanted to do was put this SVE in there, a vacuum cleaner to suck the gasoline back up out of the dirt before it got to the groundwater;

right?

A. That was part of it, yes.

Q. Okay. And right here - publish, please - in section 5.2 of your corrective action plan you recommended a combination of groundwater pumping and soil venting; correct?

A. Yes.

Q. Pumping was the way you would get hydraulic control; correct?

A. Yes.

[Vol. 3] Page 75

Q. Now I noticed at the bottom on the timetable you say that this is aggressive. Can you, based on your - you know, you've done a lot of sites. How would you rank the approach that you were taking here with other sites?

A. Very aggressive. This was a top priority site, and it was - we had a building that we were worried about, and we took - we took one of the most aggressive approaches that we could at this site.

Excerpt of Kent Campbell Trial Testimony

Volume 6 Page 117

Q. Let's talk about what Exxon did to try and clean up its mess.

Did Exxon attempt to perform a remediation of their site?

A. Yes.

Q. In your opinion, was this remediation properly carried out?

A. No.
Q. Was the remediation effective in stopping the flow of Exxon's pollution from its property to the NTCA property?
A. No.
Q. Generally speaking - and we will go into these - can you identify what was wrong with the NTCA efforts? Excuse me, with the Exxon efforts to remediate the contamination.
A. In general terms, yes, I can.
Q. Okay. Go ahead.
A. They had a few stated goals in their corrective action plan, one of which was to obtain hydraulic control or be able to control the direction of groundwater flow where it went and when it went there. And I don't think they ever really achieved that goal.

Page 122

Q. What was the purpose of putting in the combination of groundwater pumping and soil venting?
A. As it says towards the latter part of this paragraph, those two systems when installed together and working together kind of augment each other. And this is fairly common in our industry for gas station sites to do both soil vapor extraction and groundwater pump and treat.
Q. Will they augment each other to attain what end?
A. They will augment each other to help clean up the property quicker and also to help you in controlling groundwater flow.
Q. Controlling groundwater flow, is that the same thing as getting hydrogeologic control?
A. Yes, it is.

Q. Did Handex identify obtaining hydrogeologic control as a key ingredient in their plan?

A. It's certainly one of their goals, yes.

Q. And if you obtain hydrogeologic control, does that mean that you prevent your contamination from becoming somebody else's contamination?

A. That's the concept, yes.

Q. Now, we've seen – back at page 18 – where we have the recommended technology – that Handex recommended pump and treat together with soil vapor extraction. Pump the water, vacuum the soil.

Was it acceptable for Handex at this time, back in January of 1991, was it acceptable for them not to evaluate excavating the site at that time?

A. No. I think that's one of the – they looked at a number of technologies and determine that four were viable for the site, and then they looked at those four and picked their recommended technology, and I think excavation probably should have been one of the viable technologies because it – it's one that could have been done.

It was interesting that they selected land treatment as one of their viable operations, which is dig up the dirt and spread it out and do things with it to clean it up; decided they didn't have enough space to do that, but they didn't evaluate half of that, which is digging up the soil and taking it some place else for disposal.

Q. You said they should have evaluated it. Let's move past

that.

Let's assume for sake of this discussion that they had evaluated it and that they had decided, even after evaluating it in January of 1991, not to do it, and that instead they had decided to do pump and treat to pump the water and SVE to vacuum the soil. Let's assume that they evaluated it and didn't choose it.

A. Okay.

Q. Was it appropriate not to choose it if they had evaluated it?

In other words, was it – or putting I differently. Was it appropriate to choose pump and treat and SVE at that time?

A. Yes.

Q. Why?

A. Well, as they've noted, excavation can be fairly disruptive to an active gas station or any active site, and it's always preferable, I think – and it's very common in the District, particularly – to try other technologies first.

You can design a system to do pump and treat and soil vapor extraction together, and that appears to be able to achieve your goals of controlling the groundwater flow and cleaning up the site and protecting the NTCA building. And I think it's appropriate for them to have selected that technology and installed it and tried to make it work.

Q. Did Handex obtain hydrogeologic control as was their intention according to the corrective action plan?

A. No.

Q. And can you determine, reviewing this groundwater map, whether Handex has obtained hydraulic control of this

site at the end of 1991 after having installed its groundwater pumping remediation system?

A. From this, it doesn't appear that they have total control of the site, no.

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Q. In your opinion as a hydrogeologist, does this map show the groundwater control has not been obtained?

A. Yes.

Q. . . . Did you examine this map in order to determine whether hydraulic control had been obtained say halfway between then and now, 1995?

A. Yes, I did.

Q. And what conclusion did you reach evaluating the data in this map?

A. Again, from this map it still looks like the groundwater is flowing to the west off the site.

Page 174

Q. So you and Handex agree on how to read this map?

A. Yes.

Q. Does this map show that the contaminated groundwater is continuing to leave the Exxon property?

A. It does appear that way, yes.

Page 178

Q. Have you determined why it is – in addition to the pumps, have you determined why it is that Exxon did not obtain hydraulic control?

A. The most likely reason that I've determined is there were not enough wells located along the property boundary between Exxon and NTCA to capture all the water.

Q. Where did you find the answer to that?

A. Actually the answer is in a couple of different places.

The first part of the answer is in the corrective action plan. In the appendix that shows the groundwater, they call it a slug test data. I think it's the last appendix in the corrective action plan.

Q. Let me do a bit of housekeeping and then we will look at that.

You said an appendix of the corrective action plan.

A. Yes. I believe it's the last appendix.

Page 179

Q. That makes it easy. I'm going to show you appendix K of Exhibit 2. Is this the appendix you were looking for?

A. Yes.

Q. Tell the jury what this data or information means. First what it says and what it means.

A. What it discusses is what's called the capture zone. And after you've done a groundwater test, you take all your measurements – and I believe Mr. Kraus talked to you about his slug test and how that was done.

You take all those measurements, plug them into formulas, and what you're trying to determine is if I put the pump in the ground at a certain depth below the surface and I know how fast the water moves and a few other parameters, I want to try and calculate how much water or how far away from the pump water is going to be drawn to the pump. We talked about trying to get all the water to move towards the pumps.

They don't affect an infinite distance, so you run some calculations to try and figure out under this site's circumstances how far away from the pump will I be able to capture the water and bring it towards the pump to keep it from going some place else.

Q. Would you write capture zone up there right with radius of influence?

A. (Witness complied.)

MR. MITCHELL: I'd like to mark that as -

THE DEPUTY CLERK: 1316

THE WITNESS: Let me make one clarification.

The radius of influence is a distance measured from the middle of the well to the outside, the furthest point that we're influencing the water table. So that's a radius from the center of the well out to the edge. The capture zone is from edge to edge basically.

BY MR. MITCHELL:

Q. So saying it differently. The capture zone is twice

radius of influence?

A. Correct.

Q. What was the radius of influence that Handex calculated for its wells?

A. In this appendix to the corrective action plan they calculated at 12.2 feet.

Q. And that means that their capture zone was 24 feet; right?

A. 24.4 or thereabouts, yes.

Q. Now, this data is buried way back in an appendix. Did Handex understand this data?

A. I believe they did, yes.

Q. Let me show you page 19 of the corrective action plan. Does that indicate that Handex knew and understood that they only had a 12-foot radius -

A. Yes, it does.

Q. - or a 24-foot capture zone?

A. Correct.
Q. Now, if you have a capture zone of 24 feet, what does that mean to a hydrogeologist?
A. It means if you want to stop all the water from leaving a property, or if you're trying to protect the NTCA property, which is one of the concepts or goals that Handex had put forth, you need to space your wells out such that these capture zones sort of overlap a little bit so there's no gaps between the capture zones where water can kind of slip by.

Excerpt of Dr. V. Sreenivas Trial Testimony

[Vol. 15] Page 220

BY MR. BATES:
Q. Now, what was your understanding of what Exxon's remediation plan was as it was outlined in the corrective action plan?
A. This is the one which we exactly wanted on the site during those days to be implemented. It's a pump and treat and the soil vapor extraction system combined.
Q. So this was acceptable to you as it was proposed?
A. Yes. Both in the scientific community and the regulator, yes.

[Vol. 16] Page 84

Q. Let me ask you a question.
As you understand your regulations, as the regulator, if you have an open hole –
A. Yes.
Q. – and you can see contamination in the hole –
A. Yes.
Q. – is that evidence of a below-ground release?

A. If there is a confirmed release, if there is a confirmation of test results, yes, there is a leak.

Q. As you understand your regulations, do they require that an owner operator prevent further migration of released materials, released gasoline, into the surrounding soils and groundwater?

A. Yes.

Excerpt of Thomas Maguire Trial Testimony

[Vol. 17]

Page 89

Q. The question I asked was what direction is it flowing in the vicinity of MW-10?

A. Generally to the west.

Q. And that's not towards one of the recovery wells; correct?

A. That would be correct for this particular data set. After this point in time there were additional recovery wells pumping.

Q. What direction is the groundwater flowing in the southwest corner of the Exxon property?

A. It would generally be flowing to the west.

Q. Off the site and towards MW-8?

A. Certain portions of it would be flowing towards MW-8, that's correct.

THE COURT: Do you want him to go back and sit down?

MR. MITCHELL: Yes, you can sit down.

THE COURT: Can you see the witness, Mr. Bates?

BY MR. MITCHELL:

Q. Now, you're not giving an opinion that Handex always had complete hydrogeologic control of the Exxon

site; correct?

A. Not at every instance in time, that's correct.

Q. Did Handex ever on any single day have complete hydrogeologic control?

A. Well, as illustrated in the diagram we just had, they had

complete hydraulic control over the source areas on the service station site, that's correct.

Q. That's not the question I asked you.

Did they ever have complete hydraulic control over the groundwater on the Exxon site on any single day?

A. I guess I need a little clarification.

Are you asking was every molecule of groundwater controlled beneath the Exxon service station site?

Q. We will start with that question.

A. No.

Q. You said they had control over the source area. By that you meant the tank field; correct?

A. The tank field, the pump island, the dispensers, the lines.

Q. Now by the time they installed these recovery wells the contamination had already moved down-gradient towards the NTCA site; correct?

A. We don't know specifically how far the dissolved contamination had moved.

Q. We know it had gone at least as far as MW-8 and MW-10; correct?

A. That's probably a fair assumption, yes.

Q. And they did not have hydraulic control near those two wells, correct?

THE COURT: At what point in time are we talking

about?

MR. MITCHELL: At any point in time.

A. The data that I've seen are inconclusive with respect to whether there was hydraulic control in those particular wells.

Q. Are inconclusive?

A. Yes.

Q. Have you ever seen any data that shows that there was ever hydraulic control at those two wells, to a reasonable degree of scientific certainty?

A. As I indicated before, there's insufficient data to draw a conclusion one way or the other.

Q. And so you cannot conclude that there was hydraulic control?

A. In those two wells, that's correct, to that standard.

United States Constitution Amendment VII - Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

40 C.F.R. § 280.66 Corrective action plan.

(a) At any point after reviewing the information submitted in compliance with §§ 280.61 through 280.63, the implementing agency may require owners and operators to submit additional information or to develop and submit a corrective action plan for responding to contaminated soils and ground water. If a plan is required, owners and operators must submit the plan according to a schedule and format established by the implementing agency. Alternatively, owners and operators may, after fulfilling the requirements of §§ 280.61 through 280.63, choose to submit a corrective action plan for responding to contaminated soil and ground water. In either case, owners and operators are responsible for submitting a plan that provides for adequate protection of human health and the environment as determined by the implementing agency, and must modify their plan as necessary to meet this standard.

(b) The implementing agency will approve the corrective action plan only after ensuring that implementation of the plan will adequately protect human health, safety, and the environment. In making this determination, the implementing agency should consider the following factors as appropriate:

(1) The physical and chemical characteristics of the regulated substance, including its toxicity, persistence, and potential for migration;

(2) The hydrogeologic characteristics of the facility and the surrounding area;

(3) The proximity, quality, and current and future uses of nearby surface water and ground water;

(4) The potential effects of residual contamination

on nearby surface water and ground water;

(5) An exposure assessment; and

(6) Any information assembled in compliance with this subpart.

(c) Upon approval of the corrective action plan or as directed by the implementing agency, owners and operators must implement the plan, including modifications to the plan made by the implementing agency. They must monitor, evaluate, and report the results of implementing the plan in accordance with a schedule and in a format established by the implementing agency.

(d) Owners and operators may, in the interest of minimizing environmental contamination and promoting more effective cleanup, begin cleanup of soil and ground water before the corrective action plan is approved provided that they:

(1) Notify the implementing agency of their intention to begin cleanup;

(2) Comply with any conditions imposed by the implementing agency, including halting cleanup or mitigating adverse consequences from cleanup activities; and

(3) Incorporate these self-initiated cleanup measures in the corrective action plan that is submitted to the implementing agency for approval.

20 D.C.M.R. § 6208.1

6208 CORRECTIVE ACTION PLAN

6208.1 At any point after reviewing the comprehensive site assessment, the Director may require the responsible party to submit additional information or to develop and submit a corrective action plan (CAP) for responding to contaminated soils and ground water. If a CAP is required, the responsible party shall submit the plan according to a schedule and format established by the Director.